

PRIVY COUNCIL REPORT**MALAYAN BANKING BERHAD v.
TAN FONG GUAN & ORS.**

[Privy Council (Lord Diplock, Lord Simon of Glaisdale,
Lord Cross of Chelsea, Lord Salmon and
Sir Thaddeus McCarthy) June 4, 1975]

[Privy Council Appeal No. 3 of 1974]

*Land Law — Charges of land to secure advance by bank
up to limits of \$35,000 and \$30,000 respectively. — Whether
limit covers both principal and interest or principal only.*

This was an appeal from the judgment of the Federal Court ([1974] 1 M.L.J. 33). One Lim Meng See had executed two charges in favour of the appellant bank as security for all sums advanced to him by the bank up to the limit of \$35,000 under the first charge and up to the limit of \$30,000 under the second charge. Subsequently the land was subdivided and Lim Meng See transferred various lots in the land subject to the said charges to the respondents. Lim Meng See became bankrupt and at the date of the adjudication of bankruptcy the amount due to the appellant bank in respect of the advances made was \$73,173.79 with further interest thereon at the rate of 9.6%. The respondents offered to pay the sum of \$65,000 for the discharge of the lands but this was not accepted and the appellant bank applied to court for the land to be sold to satisfy the total amounts due to them. In the High Court it was held that the limits of \$35,000 and \$30,000 were intended to apply to principal only and therefore judgment was given for the appellants. On appeal it was held in the Federal Court by a majority that the words, "up to the limit of \$35,000" and "up to the limit of \$30,000", clearly governed both principal and interest and therefore upon repayment of the sum of \$65,000 with interest the respondents were entitled to have the land discharged from liability under the charges. The appellant bank appealed to the Privy Council.

Held, allowing the appeal: although the words used in the charge were ambiguous, they fitted in more naturally with the construction given to them in the High Court, that is, the limit applied to principal only.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

A. J. Balcombe Q.C. (J. M. Chadwick with him)
for the appellants.

Respondents ex parte.

Lord Cross of Chelsea (delivering the judgment of the Board): This is an appeal by Malayan Banking Berhad from a judgment of the Federal Court of Malaysia (Appellate Jurisdiction) (Suffian Ag. C.J. and Ong Hock Sim F.J., Gill F.J. dissenting) dated 20 November 1973 which allowed the appeal of the respondents Tan Fong Guan, Tan Ay Lin and Lim Tan Tee from a judgment of Mohamed Azmi J. in the High Court in Malaya at Kuala Lumpur dated December 18, 1972. The dispute between the parties relates to the amount of the sum for the repayment of which the appellants have charges on certain lands in the State of Johore of which the respondents are the proprietors; and the answer to the problem turns on the construction of two charges in favour of the appellants executed by one Lim Meng See the former proprietor of the lands in question.

The first charge which was dated May 4, 1962 was, so far as material, in the following terms: —

"THE JOHORE LAND ENACTMENT
Section 68 Schedule P. Form (iii)
CHARGE

I/We Lim Meng See being registered as the proprietor(s) (subject to the respective annual rent(s) of \$478/50 of all that/those piece(s) of land containing the respective areas of 79a

A 2r 10p or thereabouts situated in the Mukim of Labis, District of Segamat, State of Johore and more particularly described in the Schedule, and desiring to render the said land available for the purpose of securing to and for the benefit of Malayan Banking Limited, a Company incorporated in the Federation of Malaysia with its Head Office at No. 92 High Street, Kuala Lumpur and a registered office at No. 9, Jalan Aji, Segamat, Johore (hereinafter called 'the Bank') the repayment on demand of all sums advanced to me/us by the Bank in manner hereinafter appearing (with interest thereon at the rate of 12 per cent per annum) up to the limit of Dollars Thirty five thousand only (\$35,000/-).

B Do hereby charge the said land for the benefit of the Bank with the repayment on demand of the balance which on the account between me and the Bank shall for the time being be owing in respect of cheques, bills, notes or drafts drawn, accepted or endorsed by me either alone or jointly with another or others, including all moneys which may become owing in respect of any notes, bills or drafts drawn, accepted or endorsed by me either solely or jointly with another or others which may not at the time of closing the said account have become due or payable, but which for the time being have been entered in the said account, or in respect of cheques, bills, notes or drafts accepted, paid or discounted on behalf of me either alone or jointly with another or others or for loans or advances made to or for the use or accommodation of me whether alone or jointly with another or others or in respect of contracts for the forward delivery of goods, bills or specie otherwise howsoever, up to the limit of Dollars Thirty five thousand only (\$35,000/-) for principal and for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges, such sum to be raised and paid at the times and in the manner following that is to say, immediately upon the receipt by me of a notice in writing sent by the Bank in the manner hereinafter provided. And if, when the said current account shall be closed either by service of such notice in writing as aforesaid or by my/our death(s) a balance shall be owing to the Bank by me I/we or my/our legal personal representatives, as the case may be, will, so long as the same or any part thereof shall remain owing, pay to the Bank interest thereon at the aforesaid rate of 12 per cent per annum computed from the time when such balance shall have been ascertained; and I/we agree that the statement of the Agent (Sub-Agent or Accountant) of the Bank as to the amount of such balance shall be final and conclusive."

F The second charge which was dated June 11, 1963 charged the same lands and was in the same terms as the first charge save that the limit was expressed to be \$30,000 and the rate of interest payable was 9.6 per cent per annum. As appears from the headings to them both charges were in the form prescribed by the Johore Land Enactment 1935 which was the statute then applicable to registered land in that State.

G On December 6, 1963 Lim Meng See transferred the greater part of the land comprised in the said charges to the respondents subject thereto and on March 13, 1965 he was adjudicated bankrupt. At that date the amount due to the appellants on his overdraft account was \$73,173.79 made up in part of principal advanced and in part of interest. By May 15, 1971 the amount owing on the account had increased to \$116,826.53 by the addition of further interest. By letters dated June 8, 1971 and received on June 10, 1971 the appellants called on the respondents to pay them the said sum of \$116,826.53 with interest at 9.6 per cent from 16 May, stating that in default of payment they would start proceedings to enforce their security. To this the respondents replied that the maximum sum for which the lands of which they were proprietors were charged under the two charges was \$65,000 and that they were and always had been ready and willing to pay the appellants that sum in return for discharges of the two charges. The question at

issue between the parties is, therefore, simply whether the limits of \$35,000 and \$30,000 referred to in the two charges relate as the appellants contend only to principal or as the respondents contend to the total sum owing on the account whether for principal or interest.

In order to resolve that question the appellants on January 19, 1972 took out an originating summons against Lim Meng See and the respondents asking for an order for sale of the lands by public auction to satisfy the said sum of \$116,826.53 and interest. Neither Lim Meng See nor his trustee in bankruptcy took any part in the proceedings. The summons came before Mohamed Azmi J. who held that the appellants' construction of the charges was right and on December 18, 1972 made an Order for the sale of the lands under the direction of the court on February 27, 1973 to satisfy the sum of \$128,034.49 (being the amount owing to the appellants for principal and interest up to 18 December) and further interest thereon from that date at 6 per cent. In his judgment the judge said that it was clearly the intention of the parties that the limits in the charges applied only to principal. The word "and" before the words "for interest at the rate of 12 per cent" was used to introduce a distinct subject matter of charge and this view of the meaning of the operative part was supported by the inclusion of the words "with interest thereon at the rate of 12 per cent per annum" in the recital within brackets.

From this judgment the respondents appealed to the Federal Court which by an Order dated November 20, 1973 set aside the Order of Mohamed Azmi J. and ordered that, on the respondents paying to the appellants the sum of \$65,000 with interest at 9.6 per cent from June 10, 1971 to December 18, 1972 and thereafter at 6 per cent, the appellants should discharge the lands in question from liability under the two charges.

Ong Hock Sim F.J. who gave the leading judgment for the majority in the Federal Court said that the judge was wrong in thinking that the word "and" before the words "for interest at the rate of 12 per cent per annum etc." introduced a separate subject of charge to which the limit of \$35,000 did not apply. If that had been the intention of the parties, then instead of saying "up to the limit of 35,000 dollars for principal and for interest at the rate of 12 per cent per annum etc." they would have said "up to the limit of \$35,000 only for principal and for interest *thereon* etc." or "with interest *thereon* etc." What the words which they had used in the operative part meant was that the lands were charged with repayment of all sums advanced with interest thereon up to the specified limits. Suffian Ag. C.J. delivered a short judgment agreeing with that of Ong Hock Sim F.J. Gill F.J. delivered a dissenting judgment agreeing with the conclusion reached by Mohamed Azmi J. In his view it was clear both from the operative part and from the recital that the limit referred to advances made to the chargor by the appellants and did not relate to sums owing for interest and commission which were not sums "advanced" at all.

On their appeal to the Board counsel for the appellants conceded — rightly as their Lordships think — that the wording of the operative part of the charge

A is ambiguous. It may be read as saying that the land is charged with repayment on demand of the balance for the time being owing (A) in respect of advances of various types up to a limit of \$35,000 and (B) in respect of interest thereon, commission and bankers' charges. On the other hand it may be read as saying that the land is charged with repayment on demand of the balance for the time being owing in respect of advances of various types, interest thereon, commission and bankers' charges up to a limit of \$35,000. In their Lordships' view the words actually used — though susceptible of either construction — fit in more naturally with the former than the latter. In particular it is to be observed that if the words "and for interest thereon etc." do not introduce a second subject of the charge separate from the principal advanced but simply include interest, commission and bankers' charges with the principal in the specified limit then there are no words expressly charging the lands with interest on the advances as well as with the advances themselves. On that construction such a charge would have to be implied from the inclusion of interest in the limit. Moreover the fact that in the recital (which can be looked at as an aid to the construction of the operative part of a deed when it is ambiguous) the words "with interest thereon at the rate of 12 per cent per annum" are enclosed in brackets supports the view that the limit relates only to principal advances. Their Lordships therefore think that the construction of the charges adopted by Mohamed Azmi J. and Gill F.J. is right and that the appeal should be allowed. It is not possible to restore the Order of Mohamed Azmi J. since it directed a sale of the lands on a date which is long past. So the Orders of Mohamed Azmi J. and of the Federal Court must both be set aside and the case remitted to the High Court for such fresh Order to be made on the originating summons as is appropriate in the light of this judgment. The respondents must pay to the appellants their costs incurred in the High Court, the Federal Court and before the Board. Their Lordships will advise the Yang Dipertuan Agung accordingly.

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Appeal allowed.

Solicitors: *Coward Chance.*

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